

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Joint Petition for
Approval of Indirect Transfer of Control
of Qwest Operating Companies to
CenturyLink

**ORDER REGARDING THE JOINT CLECS'
MOTION FOR LEAVE TO FILE ADDITIONAL
SUPPLEMENTAL TESTIMONY AND FOR
MODIFICATION OF THE SCHEDULE**

On November 8, 2010, the Joint Petitioners filed a Settlement Agreement that they reached with Integra Telecom in the above matter. On November 10, 2010, the Joint CLECS filed a Motion for Leave to File Additional Supplemental Testimony and for Modification of the Schedule. On November 11, 2010, the Joint Petitioners filed a Response in Opposition to the CLECs' Motion, and the Joint CLECs filed a Reply to the Joint Petitioners' Response. On November 12, 2010, the Joint CLECs and the Joint Petitioners sent additional email messages to the Administrative Law Judge regarding the Motion.

Based on the record and proceedings in this matter, and for the reasons set forth in the Memorandum below, the Administrative Law Judge issues the following:

ORDER

IT IS HEREBY ORDERED as follows:

1. The Joint CLECs' Motion for Leave to File Additional Supplemental Testimony and for Modification of the Schedule is GRANTED, as described below.
2. The schedule in this matter is hereby modified as follows:

November 24, 2010	Initial Post-Hearing Briefs Filed (Joint CLECs permitted to submit affidavits regarding the Integra Settlement as it relates to their interests and the broader public interest)
December 8, 2010	Post-Hearing Reply Briefs and Proposed Findings of Fact Filed (Joint Petitioners permitted to submit affidavits responding to Joint CLEC affidavits)

December 10, 2010	Parties notify ALJ whether cross-examination is desired as to affidavits
January 10, 2011	ALJ Report
January 24, 2011	Exceptions
January 31, 2011	Reply to Exceptions

Date: November 12, 2010

/s/ Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

On November 8, 2010, the Joint Petitioners and Integra filed a copy of a settlement agreement they have reached in this matter. On November 10, 2010, the Joint CLECs¹ filed a motion requesting leave to file supplemental testimony related to that settlement agreement, and modification of the schedule to accommodate the additional testimony. The Joint CLECs contend that the unexpected settlement by Integra will cause the PUC to focus its public interest analysis in significant part on the adequacy of that settlement. Because Integra participated in this proceeding as part of the Joint CLEC group, the Joint CLECs point out that “little or no record has been developed on the differences among the CLECs and no record has been developed on those differences as they relate to the Integra Settlement. Those differences are highly relevant to the Commission’s consideration of whether the Integra Settlement is sufficient to protect wholesale customers and competition generally.”²

The Joint CLECs argue that they should be afforded an opportunity to submit additional facts relating to the adequacy of the Integra Settlement from a broader wholesale customer and competitive perspective, and the extent to which that settlement adequately addresses the merger-related concerns of the other CLECs participating in this case. They maintain that other CLECs have business models, product needs and target markets that differ from that of Integra. For example, they allege that other CLECs differ from Integra in that they serve primarily rural exchanges, depend on the non-UNE wholesale product called QLSP, or have back offices that are more developed or integrated with Qwest’s current OSS. Unless they are able to fully develop these facts relating to the Integra Settlement, the Joint CLECs argue that they

¹ In their Reply Brief, the Joint CLECs are identified as Cbeyond Communications, LLC; Level 3 Communications, LLC; McLeodUSA Telecommunications Services, Inc. d/b/a PAETEC Business Services; US Link, Inc. d/b/a TDS Metrocom; tw telecom of Minnesota, llc; OrbitCom, Inc.; and POPP.com, Inc.

² Joint CLECs’ Motion at 2.

will be prejudiced in their ability to protect their interests and provide the PUC with the record necessary to properly evaluate that settlement and the merger's impact on the broad public interest in competition.

Accordingly, the Joint CLECs proposed a modified schedule which would delay the filing of post-hearing briefs to allow time for discovery relating to the Integra Settlement, the submission of additional testimony, and a supplemental day of hearing. As an alternative to the submission of additional testimony, the Joint CLECs proposed that they be permitted to attach sworn affidavits or declarations to their briefs addressing new relevant facts relating to the Integra Settlement.

In their Response in Opposition, the Joint Petitioners argue that the Joint CLECs' motion should be denied because the Integra Settlement does not raise any new issues. They contend that all of the conditions addressed in the Integra Settlement have already been addressed in the original hearing, where the Joint CLECs presented ample testimony on the conditions they are seeking, and the Joint CLECs and other intervenors will have a sufficient opportunity to argue their respective positions regarding the Integra Settlement in their post-hearing briefs and argument before the Commission. The Joint Petitioners further assert that the Integra Settlement should not have come as any surprise because settlements between individual parties were expressly contemplated in this proceeding, and the Joint CLECs should bear the consequences of their strategic decisions to be aligned with Integra in the hearing. The Joint Petitioners also argue that granting the motion would discourage settlement by creating the risk of additional delay, hearings, and briefing associated with each settlement, and thus would be at odds with the directive in Minn. Stat. § 237.011(8) to "encourag[e] voluntary resolution of issues between and among competing providers and discourag[e] litigation." Finally, the Joint Petitioners maintain that the motion merely reflects the Joint CLECs' "strategy of delay" in this proceeding.

In the Joint CLECs' reply brief, they argued that parties typically submit evidence on partial-party settlements in Commission proceedings, and the opportunity to do so should not be foreclosed in the present case simply because the Joint Petitioners chose not to enter into the settlement with Integra until after the original evidentiary hearings had concluded. They maintain that a number of the conditions in the Integra Settlement differ materially from the conditions proposed by the Joint CLECs during the hearing, and assert that the compromises made by Integra do not reflect the business interests of the remaining members of the Joint CLEC group or satisfy the public interest. They disagree that granting the Motion would discourage settlement, and contend that ensuring a fully evidentiary record for the Commission on important disputed matters should not be viewed as an impediment to settlement.

After consideration of the parties' competing arguments in this matter, the Administrative Law Judge has determined that it is appropriate to grant the Joint CLECs' Motion. It is the practice of the Commission to "scrutinize settlements with care" to ensure that the public interest is adequately protected.³ The presentation of evidence during the hearing did not focus on the differing interests of the CLECs as they

³ Findings of Fact, Conclusions, and Order of the PUC in *In the Matter of the Application of Minnesota Power for Authority to Increase Rates for Electric Service in Minnesota*, No. E-015/GR-09-1151 (Nov. 2, 2010) at 19-20.

relate to the Integra Settlement, and any such differences would appear to be relevant to the Commission's consideration of whether the terms of that settlement provide adequate protection of wholesale customers and competition. The Administrative Law Judge is not persuaded that a limited adjustment to the schedule to allow the record to be supplemented to address this issue will cause undue prejudice to the Joint Petitioners or discourage settlement.

Accordingly, the Administrative Law Judge concludes that the receipt of limited additional factual information on this issue is consistent with principles of due process and full evidentiary development. As set forth above, the deadline for the filing of the parties' initial post-hearing briefs shall be extended to November 24, 2010. The Joint CLECs will be permitted to submit affidavits with their initial brief regarding the Integra Settlement as it relates to the interests of the remaining Joint CLECs and the broader public interest. The deadline for the filing of the parties' reply briefs and proposed findings of fact shall be extended to December 8, 2010. The Joint Petitioners will be permitted to submit affidavits with their reply brief responding to the affidavits filed by the Joint CLECs. By December 10, 2010, the parties will be required to notify the Administrative Law Judge whether cross-examination is desired as to the affidavits. It is anticipated that the report of the Administrative Law Judge will be issued by January 10, 2011 (or within 30 days of any additional proceedings that are held).

B. L. N.